Supreme Court, U.S.
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NO._____

In the
SUPREME COURT OF THE UNITED STATES

LYLE THOMAS SHELTON,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERITORARI TO THE

NEVADA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented For Review

1. Whether the Fourth Amendment to the United States Constitution requires an objective, articulate reason for the police to direct a person to exit a lawfully parked automobile.

2. Whether a search of an individual, seated in a lawfully parked car, done without probable cause or reasonable suspicion of criminal activity or ordinance infraction, can be upheld after the fact on a "caretaker" or "public safety" rationale? If so, what is the standard for such rationale?

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A. The Fourth Amendment to the United States Constitution requires an objective, articulable reason for the police to order or request a person to exit a lawfully parked automobile.

B. The "caretaker" or "public safety" exception to the Fourth Amendment warrant requirement must not be standardless, but must be based upon an appropriate balancing test, the balance of which, in this case, favors suppression of all evidence seized.

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28 U.S.C. 2101(d)
28 U.S.C. 2254

Fourth Amendment to the U.S. Constitution
Fourteenth Amendment to the U.S. Constitution

NRS 484.379
NRS 484.3792(1)(c)

Supreme Court Rule 10(b) and (c)
Supreme Court Rule 12.1.
Supreme Court Rule 16.1

II. NAME OF PARTIES

Lyle Thomas Shelton, Petitioner; and the State of Nevada, Respondent.

III. CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Lyle Thomas Shelton v. State of Nevada, Unpublished Order Dismissing Appeal, Nevada Supreme Court, No. 31390, November 24, 1998.

IV. STATEMENT OF BASIS OF JURISDICTION

This is an Application for Certiorari from the Supreme Court of the state of Nevada.

Mr. Shelton was charged by criminal information with being in actual physical control of a motor vehicle while intoxicated, third offense within seven years, in violation of NRS 484.379 and 484.3792(1)(c). The jury in Reno, Nevada returned a verdict of guilty in October of 1997. A mandatory prison sentence ensued in November of 1997, but Mr. Shelton appealed to the Supreme Court of the state of Nevada, and bail pending appeal was granted. Mr. Shelton litigated five (5) issues to the Nevada Supreme Court; his fifth issue constituted the above-referenced Fourth Amendment issues. The Nevada Supreme Court entered its Order Dismissing Appeal in the within case on November 24, 1998. Mr. Shelton filed a timely petition for rehearing.

The Nevada Supreme Court entered its Order Denying Rehearing on May 5, 1999. Mr. Shelton promptly filed a motion for Stay of Remittitur, and the same was granted on June 2, 1999.

This Petition has been filed within 90 days of the Order Denying Rehearing. Therefore, this Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 2101(d) and Supreme Court Rule 12.1.

Per Supreme Court Rule 10(b) and (c), we contend that this Court should grant Certiorari because a state court of last resort, the Nevada Supreme Court, has decided an important federal constitutional question in a way that conflicts with relevant decisions of this Court; that the lower courts have a split of authority regarding the relevant issue, with Nevada having sided (albeit inadvertently) with the minority view; and that in denying Petitioner's Petition for Rehearing on the ground asserted by the State of Nevada, the Nevada Supreme Court decided an important question of federal constitutional law (by omission) which has not been, but should be, settled by this Court.

V. FEDERAL LAW INVOLVED

The Fourth Amendment to the United States Constitution states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution states, in pari materia:

Section 1. . . Nor shall any State deprive any person, liberty, or property without due process of law;...

VI. STATEMENT OF FACTS

The Nevada Supreme Court did not discuss the facts in any particularized detail in its Order Dismissing Appeal. However, we believe the facts to be essentially undisputed:

Daniel Myers, an officer with the Reno Police Department, was on patrol at approximately 11:30 p.m. on November 27, 1996, in the area of Cashill and Skyline Boulevards in Reno, Nevada. As he drove north on Cashill, he saw a vehicle legally parked on the east side of the road. Mr. Shelton's vehicle was parked facing north, with its lights on and its motor running. Officer Myers did not see anyone in the vehicle at first, and his first concern was that someone might be hurt or the vehicle may have been subjected to a vehicle burglary. As he drove by slowly, however, he saw Mr. Shelton in the driver's seat asleep or unconscious, and Mr. Shelton was leaning back against the seat. The seat was partially reclined. Mr. Shelton's hands were below the window. Mr. Shelton's seat belt was unfastened.

Officer Myers believed that when he first passed by that the vehicle was illegally parked as an unattended, running vehicle; but when he pulled

up and saw Mr. Shelton in the driver's seat, he knew of no criminal violation at that point. He had no knowledge that anything illegal had occurred, and no knowledge that Mr. Shelton needed any kind of assistance. Officer Myers' reason for investigating was simply that he "wanted to find out what the circumstances were." Officer Myers tapped on the Petitioner's window to attempt to arouse him. After tapping on the roof of the car, Mr. Shelton came to in a startled fashion, and started slapping hard at the driver's side window. Officer Myers yelled at the Appellant to turn off his engine. Mr. Shelton did so.

Officer Myers' specific testimony appeared in the record below as follows:

Q: After he shut the vehicle off, were you able to communicate with this individual?

A: I attempted to continue to communicate with him.

Q: Was it successful or unsuccessful?

A: It was a delayed response, and he asked for things. What I asked him to do then was to step out of the car. And instead of getting out of the car or attempting to open the door, what he did was put his hand over his hip to activate, I expect where the controls were for electric windows, which, of course was unsuccessful because he had turned the ignition off and there was no power to the electric windows. I continued to ask him to open the door; however, he diverted his attention and started trying to manipulate controls in an apparent effort to turn off the lights, which, eventually, he did turn off the headlights to the car; and then he turned the ignition to the "On" position, didn't restart the car, and then lowered the window instead of getting out of the car as I'd asked. . . . Once the window was down, I was still trying to get

him to step out of the car. However, the ignition was still turned ~~to~~ the "On" position, even though the car was not running, and the radio was on. And, again, the driver became distracted to that, and he started pushing at the radio itself, like at the buttons and things, and I could hear, because the radio was up loud enough, it was changing the channels, and he continued to do that until he finally pushed a button which turned the radio off. At that time, I was able to get him to open the door and step out of the car.

Mr. Shelton was parked in front of his own home. It is not unusual for people in that particular neighborhood to park their vehicles on the street.

Mr. Shelton's position to the court below (and here) is that his Fourth Amendment rights were violated when Officer Myers directed him to exit his vehicle, and investigated him further. Mr. Shelton asserts that, at the time he was told to leave his vehicle, Officer Myers had no information that Mr. Shelton or anyone in that neighborhood had been involved in, or was the victim of any criminal activity, and that there was no evidence at that point in time that Mr. Shelton was in any apparent or known distress. Further, at the time Officer Myers directed Mr. Shelton to exit the vehicle, Officer Myers had no information that Mr. Shelton had been drinking or was under the influence of intoxicants; that knowledge came only after Officer Myers ordered Mr. Shelton out of the vehicle and Officer Myers investigated the situation further.

Both the state of Nevada and the Nevada Supreme Court appeared to concede, implicitly, that Officer Myers had no probable cause or reasonable

suspicion to investigate anything, whether criminal/traffic violations or health and safety concerns, at the time Officer Myers directed Mr. Shelton to exit his vehicle. However, the position of Nevada was that Mr. Shelton, under those circumstances, enjoyed no Fourth Amendment rights; Officer Myers had the unfettered discretion to order Mr. Shelton to exit the vehicle, regardless of any cause or suspicion.

In its Order Dismissing Appeal of November 24, 1998, the Nevada Supreme Court adopted Nevada's position. Specifically, the Nevada Supreme Court stated:

> "Based on our review of the record on appeal, we conclude that the police officer's approach towards Appellant's vehicle, and the officer's act of tapping on the driver's side window did not constitute an investigatory stop from which the officer needed a reasonable suspicion of criminal activity. Because Appellant's vehicle was parked on a public street, the officer in question could permissibly approach Appellant's vehicle to question the Appellant or inquire into his welfare without running afoul of the Fourth Amendment. See: Florida v. Royer, 460 U.S. 491, 497 (1983); State v. Burkholder, 112 Nev. 535, 915 P. 2d 886 (1996). Accordingly, the police officer did not need a reasonable and articulable suspicion of criminal activity when he approached Appellant's vehicle and thus the encounter did not constitute an improper investigatory stop in violation of Appellant's Fourth Amendment rights."

In Mr. Shelton's petition for rehearing to the Nevada Supreme Court, he respectfully submitted that that court below severely misapprehended the issue. He stated therein that he did not disagree with the proposition that a police officer can approach a vehicle, tap on the driver's window, wake the

driver up, and signal to the driver to turn off the engine. But, he contended, had Officer Myers done that, and nothing more, this case never would have happened; this case happened because Officer Myers commanded Mr. Shelton to exit the vehicle. Once Mr. Shelton complied, then, and only then, did Officer Myers discover Mr. Shelton's intoxication, which necessarily led to his arrest. Mr. Shelton argued that the precedent of this Court is clearly and unambiguously to the effect that a police officer cannot direct or order a driver out of a vehicle without probable cause or a reasonable suspicion.

In traversing Mr. Shelton's Petition for rehearing, Nevada argued that Mr. Shelton had recast the issue from his initial petition for rehearing, although Nevada candidly admitted that the issue was raised in Mr. Shelton's reply brief prior to the November, 1998 disposition. Nevada then argued that Officer Myers' request to have Mr. Shelton get out of his car was merely an extension of the "caretaker concern" expressly upheld by this Court in Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2531, 37 L. Ed. 2d 706 (1973), and that at least one court (the Idaho Court of Appeals in State v. McAfee, 783 P. 2d 874, 876-77 (Idaho App. 1989)) was in accord with that approach.

The Nevada Supreme Court summarily denied the Petition for Rehearing. Therefore, it is unknown whether the Nevada Supreme Court stuck to its original reasoning, or adopted Nevada's theory articulated in the Re-

sponse to the Petition for Rehearing.

VII. REASONS FOR GRANTING THE WRIT

A. THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES AN OBJECTIVE, ARTICULABLE REASON FOR THE POLICE TO ORDER OR REQUEST A PERSON TO EXIT A LAWFULLY PARKED AUTOMOBILE.

To begin with, the notion that a person seated in a lawfully parked motor vehicle has absolutely no protections under the Fourth Amendment is totally without merit. This Court stated in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979):

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As Terry v. Ohio [392 U.S. 1, 88 S. Ct. 1860, 20 L. Ed. 2d 889 (1968)] recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. [Cite omitted]"

Prouse, 440 U.S. at 663-64; 99 Ct. at 1400-1. Further, this Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971):

"The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States [267 U.S. 132, 45 S. Ct. 280, 169 L. Ed. 543 (1925)] - no alerted criminal bent on flight, no fleeing opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where it is not practicable to secure a warrant," Carroll, supra at 153, 45 S. Ct. at 285, and the "automobile exception," despite its label is simply irrelevant."

Coolidge, 403 U.S. at 461-62, 91 S. Ct. at 2035-36.

This Court has never held that where a police officer has occasion to speak with a driver of a vehicle, he may also as a matter of course order the driver out of the car. Pennsylvania v. Mimms, 434 U.S. 106, 111, n. 6, 98 S. Ct. 330, 333, n. 6, 54 L. Ed. 2d 331 (1977). Quite the opposite has occurred: This Court has consistently held that as a matter of course a police officer who conducts a lawful traffic stop may order the occupants of the vehicle to exit the same. Maryland v. Wilson, 519 U.S. 408, 410, 117 S. Ct. 882, 884, 137 L.Ed. 2d 41 (1997); Ohio v. Robinette, 519 U.S. 133, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); Knowles v. Iowa, _ U.S. _ , 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998). Otherwise, this Court's distinction of Prouse, ante in Whrenn v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed 2d 89 (1996) would be meaningless. The Fourth Amendment requires at least a reasonable and articulable suspicion that a motorist has committed an infraction of the law as a precursor to seizing him; but that concern is in fact satisfied

when the driver in fact commits such an infraction, regardless of whether a "reasonable" officer would have seized the driver for that reason. Whrenn, 517 U.S. at 816-19, 116 S. Ct. at 1774-76.

All of this was argued to the Nevada Supreme Court in the opening brief, the reply brief and the oral argument. For the state of Nevada to suggest otherwise is simply wrong. We attach copies of the pertinent portions of the briefs to the appendix, so that this Court will not misapprehend that certiorari cannot providently be granted.

We do not dispute for a moment the proposition that it is a fair generalization that if a law enforcement officer is able, by the use of his natural senses, to discover what is inside a vehicle "while standing in a place where he has a right to be," this discovery does not constitute a Fourth Amendment search. LaFave, Search & Seizure, 3d. ed., 2.5(c), p. 557. Neither do we dispute for a moment that it is not unlawful, but entirely lawful for a police officer who is on a public street or a sidewalk to look, either deliberately or inadvertently, into an automobile that is parked on the street and to observe what is exposed therein to open view. Likewise, there is no rule which precludes the introduction into evidence of objects seen through the window of an automobile by a law enforcement officer who in the performance of his duties is making a blanket surveillance of automobiles in a public parking lot by looking through the windows. LaFave, Id at 558; and see: United States v.

Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983).

But from that starting point the Nevada Supreme Court goes one step further: if such an officer sees someone or something that doesn't "strike him right," even if he can't articulate it, as long as he has a "hunch" that something may be wrong, he may invade the owner's privacy without a warrant, either by ordering him out of the vehicle or by searching the vehicle. That simply is not the law.

This Court held in New York v. Class, 475 U.S. 106, 106 S. Ct. 960, 89 L.Ed. 2d (1986) that an automobile's interior is subject to Fourth Amendment protection from unreasonable intrusions by the police. Class, 475 U.S. at 114-15, 106 S. Ct. at 966. Therefore, the Fourth Amendment would not authorize police officers to enter a vehicle to obtain a dashboard-mounted V.I.N. when the V.I.N. is visible form the outside of the vehicle; in that instance there is no justification for governmental intrusion into the passenger compartment to see it. Class, 475 U.S. at 119, 106 S. Ct. at 968-69.

Likewise, "police hunches" simply do not constitute a proper standard as to justify a warrantless automobile search under the Fourth Amendment. This Court made clear in United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L.Ed. 2d 1 (1989) that a reasonable suspicion entails some minimal level of objective justification for making a stop, that is, something more than an unparticularized suspicion or hunch, but less than the level of

suspicion required for probable cause. Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585.

Further, contrary to what the Nevada Supreme Court may think, in no way does Florida v. Royer, ante, stand for the proposition that the police, upon looking into a vehicle and seeing something that strikes them as strange, order the occupants out of the vehicle without any further cause or suspicion.

Royer was a 5-to-4 holding, upholding suppression based on the scope of the investigatory stop (as opposed to the fact of it), but Justice Brennan, concurring in the result, dissented on the point of the initial stop. He noted that, per Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), the scope of any Terry-type of investigation must be extremely limited, or the Terry exception will swallow the general rule that the Fourth Amendment searches and seizures are reasonable only if based on probable cause. Royer, 460 U.S. at 510-11, 103 S. Ct. at 1331. Because only four justices out of the nine agreed on the lack of probable cause ruling, it was error for the Nevada Supreme Court to cite Royer with any authority. It is well settled that when no single rationale commands a majority of the Supreme Court, the holding of the Court may be viewed as the position taken by those members who concurred in the judgment on the narrowest grounds. City of Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750, 764, n.9, 108 S. Ct. 2138, 2148, n.9, 100 L. Ed. 2d 771 (1988), and cases cited

therein. Thus, Rover's holding has to do with the scope of the investigatory stop, not the fact of it.

Secondly, Rover is an "on foot" case, whereas this case is an "automobile" case. To the extent that the Nevada Supreme Court believes that Rover permits the police to order or request citizens out of their vehicles without any type of cause or suspicion, consistent with the Fourth Amendment, the distinction is with a difference.

Thirdly, the point made in Rover was subsequently adopted by a majority of this Court in I.N.S. v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 8 L. Ed. 2d 247 (1984), and Florida v. Bostick, 501 U.S. 429, 434, 437, 111 S. Ct. 2382, 2836, 2387, 115 L. Ed. 2d 389 (1991), but must be read in light of those cases. Per Delgado, an officer who goes beyond questioning and engages in conduct, wherein a reasonable person would not feel free to leave, implicates the Fourth Amendment. Delgado, 466 U.S. at 215-17, 104 S. Ct. at 1762-63. Per Bostick, consensual questions to a defendant and a request to produce identification and to search luggage is not a search or seizure, so long as the officers do not convey a message that compliance with their requests is required. Clearly, a citizen's decision to cooperate with law enforcement authorizes the police to conduct a search without first obtaining a warrant only if the cooperation is voluntary. "Consent" which is not the product of official intimidation or harassment is no consent at all. Citizens

do not forfeit their constitutional rights when they are coerced to comply with a request they would prefer to refuse. Bostick, 501 U.S. at 438, 111 S. Ct. at 2388.

The Nevada Supreme Court's reliance on Royer, without reference to Bostick or Delgado, created the very type of error that has gone on for the past decade in the state of Illinois. In People v. Murray, 560 N.E. 2d 309 (Ill. 1990), the Illinois Supreme Court, relying upon Royer and United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed 2d 497 (1980), even while acknowledging that Royer and Mendenhall were not majority opinions, held that where an officer merely "requests" an individual to exit a vehicle, no Fourth Amendment seizure occurs when the vehicle's occupant immediately complies with the "request." Murray, 560 N.E. 2d at 312-14. Citing Murray as authority, although Murray was decided prior to Bostick, the Appellate Court of Illinois, without considering Bostick, held that overhead flashing lights, with no other "show of authority," did not implicate the Fourth Amendment. People v. Quigley, 589 N.E. 2d 133, 135-36 (Ill. App. 1992). Then, in City of Highland Park v. Lee, 683 N.E. 2d 962 (Ill. App. 1997), the very same Appellate Court of Illinois held that use of officer vehicle overhead lights in fact constituted a show of authority sufficient to implicate the Fourth Amendment. In so holding, that court disapproved Quigley and relied upon Bostick. Lee, 683 N.E. 2d at 964-66.

Obviously, the Appellate Court of Illinois could not say that the Illinois Supreme Court was wrong in Murray; but in light of Delgado and Bostick, in hindsight, they clearly were. If a uniformed police officer awakens a sleeping occupant in a motor vehicle by rapping on the window and signals to the occupant several times to "get out," such is clearly a show of authority per Bostick and Delgado. Whether the Fourth Amendment is implicated should not turn on whether the officer said, "please," or whether the occupant responded "why should I have to?!"

Indeed, the basic definition of a "seizure" is this: a "seizure" occurs when there is some meaningful interference with an individual's possessory interest in that property. United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984), and cases cited therein. Following that basic definition, when an agent of the state directs the movements of a citizen, that citizen is "seized"; seizure does not turn on whether the agents label their activities as "orders" or "requests." Most reasonable citizens, including Mr. Shelton, are expected to and in fact comply with directions of a police officer, and not make the officer say, "I order you to get out." Creating this distinction would therefore give Fourth Amendment protections only to citizens who are or may be rebellious and/or obstructionist.

That certainly would be unwise policy; and it would be policy that obscures the greater meaning of the Fourth Amendment, which is in part to

protect citizens' interests in privacy. Texas v. Brown, 460 U.S. 730, 747, 103 S. Ct. 1535, 1546, 75 L. Ed 2d 502 (1983) [J. STEVENS, concurring in judgment] Clearly, when Mr. Shelton was napping in his lawfully parked car, parked next to his own home, he had a very real expectation of being left alone until he was ready to walk back into his home. He did not have any reasonable expectation of being awakened, being directed to exit his vehicle, and being arrested at that time.

Other courts which have considered the question, both post- and pre-1991, have determined that an officer who directs activity upon the part of the suspect, such as telling him to "stop" or "halt", implicates the Fourth Amendment within the test of Delgado and Bostick, whether or not the direction is labelled as a "request" or as a "command." See: United States v. Wood, 981 F. 2d 536, 539-41 (D.C. Cir. 1992) [reversing conviction]; Revels v. State, 666 P. 2d 1298, 1300 (Okl. Cr. App. 1983) [reversing conviction]; United States v. Tolbert, 692 F. 2d 1041, 1046 (6th Cir. 1982); United States v. Palmer, 603 F. 2d 1286, 1288-89 (8th Cir. 1979) [reversing conviction]; People v. Boodle, 418 N. 4. Supp. 2d 352, 354 (N.Y. 1979); Hughes v. State, 588 S.W. 2d 296, 302-08 (Tenn. 1979); State v. Quezada, 681 A. 2d 79, 81 (N.H. 1996); Parker v. Commonwealth, 496 S.E. 2d 47, 49-50 (Va. 1998); and People v. Padgett, 932 P. 2d 810, 813-14 (Colo. 1997) [affirming grant of motion to suppress].

Notwithstanding the fact that the Nevada Supreme Court's view of Fourth Amendment law is clearly contrary to the direction that this Court has set forth over the past three decades, there actually is lower court authority in accord with what the Nevada Supreme Court did here. This Honorable Court needs to take certiorari and to disapprove those cases, in addition to reversing this one.

In State v. Williams, 371 So. 2d 1074 (Fla. App. 1979), the Florida Court of Appeals held that approaching a parked car and ordering the occupants out was not a Terry stop, reasoning that that holding followed from Mimms. Professor LaFave criticizes the Williams holding, noting that the court was "most assuredly incorrect," because Williams involved no lawful stop or ground therefor, and thus, no factor implicating officer safety was involved. LaFave, ante, 9.3 (a), p. 107.

In spite of Professor LaFave's criticism of Williams, Williams has been cited as authority in State v. Schlosser, 774 P. 2d 1132, 1138 (Utah 1989), People v. Maxwell, 254 Cal. Rptr. 124, 127 (Cal. App. 1988), and Cousart v. United States, 618 A. 2d 96, 108 (D.C. App. 1992)[1]

Likewise, in Borowitz v. North Dakota Department of Transportation, 529 N.W. 2d 186 (N.D. 1995), a case with very similar facts to this one, except in the context of driver's license revocation rather than criminal conviction, the North Dakota Supreme Court held that a police officer who looks

through a window and sees a person asleep in the car is justified in ordering the person out of the car. Borowitz, 529 N.W. 2d at 188. The Borowitz opinion does not clearly indicate whether the officer had a reasonable suspicion of the driver's intoxication before he ordered him out of the vehicle, although the officer detected "symptoms consistent with intoxication" based in part on a conversation the officer had, before requesting the driver to exit the vehicle; accordingly, Borowitz is arguably in accord with Williams, and to that extent, likewise needs to be disapproved.

A final practical reason exists for the granting of certiorari herein. If this were a Fifth Amendment issue, the position could always be taken that Mr. Shelton could explore his issue in the guise of a 28 U.S.C. 2254 writ. However, per Stone v. Powell, 428 U.S. 465, 495, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067 (1976), where the state has provided the opportunity for a full and fair litigation of a Fourth Amendment claim, the state prisoner cannot be granted Federal habeas corpus relief on the basis that the evidence obtained against him was the product of an unconstitutional search and seizure. Here, Mr. Shelton had his "full and fair opportunity"; and the summary denial of this writ, we respectfully submit, could be tantamount to saying, "The Nevada Supreme Court was wrong, but so what? In fact, they were clearly, egregiously wrong; but so what? We're not interested. Mr. Shelton, go to prison." We submit that that approach would be fundamentally unjust. If the

Court concludes that the Nevada Supreme Court clearly misapprehended the scope of the Fourth Amendment, just as Professor LaFave so concluded with respect to the Florida Court of Appeals in Williams, then pursuant to this Honorable Court's powers per Supreme Court Rule 16.1, it should summarily reverse the Nevada Supreme Court's order dismissing appeal and remand for further proceedings. Cf. Florida v. Rodriguez, 469 U.S. 1, 12 (1984).

B. THE "CARETAKER" OR "PUBLIC SAFETY" EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT MUST NOT BE STANDARDLESS, BUT MUST BE BASED UPON AN APPROPRIATE BALANCING TEST, THE BALANCE OF WHICH, IN THIS CASE, FAVORS SUPPRESSION OF ALL EVIDENCE SEIZED.

The state of Nevada argued to the Nevada Supreme Court that the seizure of Shelton could be upheld on a "public caretaking" or "public safety" type of rationale, based upon Cady v. Dombrowski, ante. Clearly, Cady is factually inapposite. This Court upheld a warrantless seizure of a vehicle where it was left parked and disabled along a highway, such that it was a nuisance, and the accused was intoxicated and comatose, and therefore could not make arrangements to have the vehicle towed and stored, and the standard inventory search of the trunk, revealing a revolver, ensued. Cady, 413 U.S. at 441, 93 S. Ct. at 2528. Significantly, unlike this case, the vehicle was

not on the premises or in the custody of the owner at the time it was seized and searched. Cady, 413 U.S. at 448-49, 93 S. Ct at 2531. However, obiter dictum in Cady indicates that the police could properly engage in a "caretaking function" in seizing the vehicle. From that dicta, lower courts have created a "public safety" exception to the Fourth Amendment's warrant requirement, which does not require probable cause or even a reasonable suspicion of any type of criminal—whether felony or misdemeanor—activity afoot or in the recent past.

We submit that the best analysis of this issue is contained in United States v. Dunbar, 470 F. Supp. 704 (D. Conn. 1979), affirmed, 610 F. 2d 807 (2d Cir. 1979) (table). As noted in Dunbar, where an officer stops a defendant for a stated benign purpose (of assisting the motorist), both the governmental interests and the privacy interests are slight; but if the individual is not even remotely suspected of any conduct in violation of criminal or regulatory standards, and if the police do not have adequate objective (that is, good faith and reasonable) reasons for believing that the motorist is in need of assistance, then the Fourth Amendment is implicated. The Fourth Amendment stands against initiating a new line of cases in which the officer says, "I thought he was lost," and justifies his seizure based thereon. Dunbar, 470 F. Supp. at 707-08. Cases in accord with Dunbar include: People v. Deppert, 403 N.E. 2d 1279, 1283 (Ill. App. 1980); State v. Brown, 509 N.W. 2d 69, 71-

72 (N.D. 1993); State v. Oxley, 503 A. 2d 756, 759 (N.H. 1985); State v. Morton, 951 P. 2d 179, 182 (Or. App. 1997); State v. Templeman, 492 S.E. 2d 902, 904 (Ga. App. 1997). In fact, McAfee, ante, cited by Nevada to the Nevada Supreme Court as authority for denying the Petition for Rehearing, also is in accord.

We submit that Dunbar is perfectly in accord, both with the objective test of Whrenn v. United States, ante, and the balancing test of Wilson, ante, and Mimms, ante. That is to say, if a police officer were to see an occupant of a vehicle truly in distress based upon objective factors, it would be hard to argue the proposition that that officer must not render assistance to such an occupant, unless there is also probable cause or a reasonable suspicion of criminal activity. On the other hand, however, if an officer sees no such objective facts by which he could reasonably conclude that the vehicle's occupant is in need of assistance, and there otherwise are no facts indicating probable cause or a reasonable suspicion of criminal activity afoot, it is absolutely offensive to the Fourth Amendment to permit the officer to "make something up" after the fact, as the supposed justification for engaging in the warrantless seizure. If that conduct is allowed, then why not allow "storm troopers" to invade our homes for no particular reason without a warrant and later say, "I thought they were sick"??

The Dunbar approach is also consistent with this Court's pronounce-

ments in Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). This Court rejected "officer safety" as a talisman to justify a standardless "Terry search," as follows:

> Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of 180-a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that "[t]he answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." People v. Rivera, 14 N.Y. 2d 441, 446, 252 N.Y.S. 2d 458, 463, 201 N.E. 2d 32, 35 (1964) cert. denied, 379 U.S. 978, 85 S. Ct. 679, 13 L. Ed. 2d 568 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Terry v. Ohio, supra. Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—"You know what I am after"—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket. Sibron, 392 U.S. at 64, 88 S. Ct. at 1903.

In this case, Officer Myers saw Mr. Shelton asleep in his motor vehicle, late at night on a public street, with the lights on and the motor running.

To be sure, that was an unusual sight; however, the fact that it was "unusual", by itself, did not give Officer Myers cause to engage in a Fourth Amendment seizure. See: United States v. Smith, 799 F. 2d 704, 709-10 (11th Cir. 1986); United States v. Cruz, 581 F. 2d 535, 542 (5th Cir. 1978); Malina v. Gonzales, 994 F. 2d 1121, 1126 (5th Cir.) rehearing denied, 1 F. 3d 304 (1993); United States v. Powell, 929 F. 2d 1190, 1193-94 (7th Cir.), cert denied, 502 U.S. 981 (1991); United States v. Gastellum, 927 F. Supp. 1386, 1390-93 (D. Colo. 1996); State v. Reynolds, 899 P. 2d 540, 543 (Mont. 1995); Grinde v. State, 813 P. 2d 473, 475 (Mont. 1991); Pomerenke v. Motor Vehicles Division, 896 P. 2d 1214, 1216 (Or. App. 1995); State v. Sierra, 754 P. 2d 972, 979 (Utah App. 1988). Contra: Borowitz, ante, citing Wibben v. North Dakota State Highway Commissioner, 413 N.W. 2d 329, 332-33 (N.D. 1987).

However, rather than immediately order Mr. Shelton out of the vehicle while he was asleep therein or roll down his window and talk, Officer Myers drove by, approached the vehicle, tapped on the window, woke Mr. Shelton up, signaled to Mr. Shelton to turn off his engine, and Mr. Shelton complied. All of that happened before Mr. Shelton was ordered or requested to step out of the vehicle. By the time Mr. Shelton complied with Officer Myers and actually exited the vehicle, it was obvious at that point that Mr. Shelton was not in distress or need of assistance. Thus, at that point, the Fourth Amendment balance clearly tipped in favor of Mr. Shelton's right of

privacy, versus the police officer's safety or concern for the public, including Mr. Shelton. It must not be forgotten that in Wilson, the balance tipped in favor of officer safety because that officer had already detected the driver of the vehicle as having done something wrong, that is, having violated a traffic ordinance. Here, Mr. Shelton had apparently done absolutely nothing wrong, and by the time he exited the vehicle per officer Myers' request, was in no need of assistance. The tension between the majority and the dissent in Wilson is to what extent the Fourth Amendment protects individuals about whom there is not even a scintilla of evidence of any potential risk to the police officer at the time of the stop. Compare 519 U.S. 413, n. 2, 519 U.S. at 415-16; 117 S. Ct. at 885-86, n.2; 117 S. Ct. at 887. It is difficult to understand why the Fourth Amendment offers no protection to an individual like Mr. Shelton, when there not only is not even a scintilla of evidence of any potential risk to the officer at the time of the seizure, but also, there is not even a scintilla of evidence that he (or anyone else) has done anything wrong or is in need of any type of assistance at the time of the seizure.

Accordingly, this Court needs to take certiorari, adopt appropriate standards of review for this important area of law, vacate Mr. Shelton's judgment, and remand for further consideration not inconsistent with the Court's opinion.

DATED this _____ of _____, 1999.

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[1] Williams is factually distinguishable, in that there, the officer received an uncorroborated tip that a weapon was inside the vehicle, before ordering the occupant out of the vehicle. Whether that distinction is with or without a difference, here we don't have anything that criminally suspicious.